NO. COA06-879

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

STATE OF NORTH CAROLINA

v

Buncombe County
No. 05 CRS 50424

MICHAEL DWAYNE SHELTON,
Defendant.

Appeal by defendant from judgments entered 2 February 2006 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 21 February 2007.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, for the State.

Charns & Charns, by D. Tucker Charns, for defendant.

BRYANT, Judge.

Michael Dwayne Shelton (defendant) appeals from 2 February 2006 judgments entered consistent with jury verdicts convicting him of felony habitual impaired driving and misdemeanor driving while license revoked. The trial court sentenced him to a minimum of eighteen months and a maximum of twenty-two months imprisonment.

The State's evidence tended to show: On 8 January 2005, Officer Michael Garrison and Officer Meg Donahue of the Asheville Police Department were on foot patrol in the Hillcrest complex, a high crime area. At approximately 1:30 a.m., they heard loud music coming from a car proceeding through the main entrance into the

complex. Officer Garrison observed the car en route for about a tenth of a mile. The car pulled up right in front of the officers and into a parking space and stopped. The music was still on and no one got out of the car. Officers Garrison and Donahue waited about 30 seconds for the music to stop. They approached the car and found defendant in the driver's seat and a passenger in the front seat. Officer Garrison requested that defendant turn down the music and noticed a strong odor of alcohol on defendant's breath. Both officers noticed defendant's eyes were glassy and blood shot. There was a bottle of brandy in the front passenger side and a case of beer and empty alcohol bottles in the back seat. When defendant spoke, Officer Garrison noticed his speech was slurred and muffled. Defendant told Officer Garrison that Officer Garrison could not deal with defendant because the keys were not in the ignition and the car was parked. When Officer Garrison asked defendant to get out of the car, defendant stumbled. Defendant refused to perform any field sobriety tests. Both officers noticed the strong odor of alcohol remained with defendant. Defendant was arrested for DWI and transported to the Buncombe County Detention Facility to be administered a breathalyzer test. Defendant refused to take the breathalyzer test. However, Officer Donahue noted on her DWI report form that defendant had a strong odor of alcohol, was "hilarious, talkative and cocky," "laughing" and that his impairment was extreme.

After being informed of his Miranda rights, defendant agreed to answer some questions. Defendant stated he was not operating a

vehicle, he was going "nowhere" and coming from "nowhere." Defendant stated he was on the only street leading into the complex and his direction of travel was "just around the corner." When asked what he was doing for the three hours prior to being apprehended, defendant said "Had a good time . . . drinking." When asked when he began drinking he said "seven." He said he had been drinking "B&J." Officers did in fact find brandy in the car. Defendant said he had consumed a half of a bottle, which was the same amount found remaining in the bottle in the car. When asked when defendant had stopped drinking, he said "When you all got me." Defendant stated he was not under the influence of an alcoholic beverage and had been parked.

At trial, both officers testified defendant's mental and physical faculties were "appreciably and extremely impaired."[1] Defendant presented testimony of Vincent Finley, the passenger in the car and his lifelong friend. Mr. Finley testified that he and defendant were sitting in the car that belonged to Travis Simpson drinking B&J. They had been there for four hours. Defendant drank about one half a bottle of brandy. Mr. Finley testified they had been listening to music and had not moved the car for four hours. The keys to the car were in the seat when the officers approached the car. Defendant appeals.

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[1]Officer Garrison based his opinion on defendant's glassy blood shot eyes, his slurred and mumbled speech, his stumbling and staggering, struggling getting out of the car.

Defendant argues: (I) he received ineffective assistance of counsel because his trial counsel failed to request a recordation of jury *voir dire*, opening and closing statements and that the trial court erred for failing to *sua sponte* require the same; (II) the trial court erred by denying defendant's motion to suppress statements because he waived his Fifth Amendment Miranda rights; and (III) the trial court erred in accepting defendant's admission that he had three prior DWI convictions and in accepting defendant's stipulation as a Level III offender.

I

Defendant argues his trial counsel's failure to request recordation of jury *voir dire*, opening statements and closing arguments constitute ineffective assistance of counsel and that the trial court erred for failing to *sua sponte* require the same. Defendant cites no authority and acknowledges that this argument has been repeatedly rejected by the Court. Defendant says "[a]ppellate counsel is well aware of this Honorable Court's view on this issue and respectfully requests that this Court re-consider its position." We decline counsel's request.

As for counsel's ineffective assistance of counsel claim, this Court is bound by the Supreme Court's rulings as set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984) and *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985); *see In The Matter of: The Appeal From The Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a

subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."); and *State v. Bowden*, ___ N.C. App. ___, 630 S.E.2d 208 (2006). "[I]t is not [this Court's] prerogative to overrule or ignore . . . written decisions of our Supreme Court," *Kinlaw v. Long Mfg., N.C. Inc.*, 40 N.C. App. 641, 643, 253 S.E.2d 629, 630, *rev'd on other grounds*, 298 N.C. 494, 259 S.E.2d 552 (1979); *State v. Parker*, 140 N.C. App. 169, 172, 539 S.E.2d 656, 659 (2000).

In *State v. Hardison*, 326 N.C. 646, 392 S.E.2d 364 (1990), our Supreme Court found that the defendant failed to establish ineffective assistance for failure to request recordation of the jury selection and bench conferences when no specific allegations of error were made and no attempts were made to reconstruct the transcript. *Id.* at 661-62, 392 S.E.2d at 373. In *State v. Price*, 170 N.C. App. 57, 67, 611 S.E.2d 891, 898 (2005), this Court recently held that our case law does not support the argument that the trial court must ensure recordation of those items specifically exempted by statute from the record, and defendant cannot show prejudice from the failure to do so. *See* N.C. Gen. Stat. § 15A-1241(a) (2005) ("The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings *except*:(1) Selection of the jury in noncapital cases; (2) Opening statements and final arguments of counsel to the jury; and (3) Arguments of counsel on questions of law.")(emphasis added).

Here, defendant failed to cite any error arising from the lack of recordation of jury selection, opening statements or closing arguments. Accordingly, defendant has made no showing that a lack of such recordation amounts to ineffective assistance of counsel such that the outcome in his case has been prejudiced. Defendant has also not cited authority requiring the trial court to record those items specifically exempted by statute. *Id.* These assignments of error are overruled.

II

Defendant next argues the trial court erred by denying defendant's motion to suppress statements because he waived his Fifth Amendment Miranda rights. Defendant contends the State failed to establish that he waived his *Miranda* rights. We disagree.

> It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting."

State v. Buchanan, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewinston*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000)), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001). Both the United States Supreme Court and this Court have held that Miranda applies only in the situation where a defendant is subject to custodial interrogation. *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997).

On the day of the trial, defendant filed a written motion to suppress any statement taken from defendant after he was in custody and for which he did not waive his rights. The trial court found that the conversation at the car between the officers and defendant was non-custodial and not subject to *Miranda*. With respect to the questions asked of defendant at the Buncombe County Detention Facility, the trial judge found as follows:

> At that time Officer Donahue informed the Defendant of what is commonly referred to as his Miranda Rights. Informed him of his rights to counsel, right to remain silent, statements he made can be used against him, and his right to court appointed counsel, if he cannot afford one, one will be appointed for him. She then asked him if he had any questions and he responded that he did not. She stated that she reached the conclusion that he understood those rights and began to ask questions contained and the answers which are contained on the Driving While Impaired Form, HP-327. At some point during the interview the Defendant, Mr. Shelton, exercised his right to silence and did not answer any further questions.

The trial judge then concluded:

> [T]he Defendant was properly advised of his Miranda Rights and taken to the Buncombe County Detention Facility. That he made a knowing waiver after being informed of it and answered the questions that are answered on the interview form.

It is not required that a waiver be "express" nor that a signature be required for a confession to be admissible. *See State v. Monroe*, 27 N.C. App. 405, 407, 219 S.E.2d 270, 271 (1975). This Court has held "[a]n implicit waiver may be sufficient." *State v. Curry*, 42 N.C. App. 69, 71, 255 S.E.2d 658, 660 (1979) (citing *North Carolina v. Butler*, 441 U.S. 369, 60 L. Ed. 2d 286 (1979)).

Whether or not there has been a waiver depends on "the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." *State v. Curry*, 42 N.C. App. 69, 71, 255 S.E.2d 658, 660 (1979) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466 (1938)).

Defendant contends based on Officer Donahue's testimony that any waiver was insufficient, making the statements involuntary. Officer Donahue read defendant his *Miranda* rights from a card she carries. She asked defendant if he had an questions about those rights to which he replied he had none. Officer Donahue concluded that defendant understood his rights. Officer Donahue then told defendant that she was going to ask him some questions. Defendant began answering her questions. At some point thereafter, defendant stopped answering the officer's questions.

In his brief on appeal, defendant does not specify which statements were improperly admitted at trial. In fact, most of defendant's statements were exculpatory. Defendant admitted to consuming alcohol, but never admitted "to drinking and driving." Therefore any statements defendant made were harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2005).

Here, there was a sufficient waiver of defendant's *Miranda* rights. The findings of fact of the trial judge made at the hearing on the motion to suppress are supported by the evidence and support the conclusions of law. Defendant's motion to suppress was properly denied. This assignment of error is overruled.

III

Defendant next argues the trial court erred in accepting defendant's admission that he had three prior DWI convictions and in accepting defendant's stipulation to being punished as a Level III offender. Defendant contends that his trial counsel's stipulation as to prior convictions was insufficient. We disagree.

Defendant can stipulate to his prior convictions as long as the stipulation is "definite and certain" and "assented to by the parties." *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961). Prior to the close of the State's evidence and outside the presence of the jury, the trial court arraigned defendant on the three prior convictions that were elements of the habitual DWI charge. The trial court read the dates and charges to defendant as outlined in the indictment and asked him whether he would admit to them. The following colloquy ensued:

> MR. SNEAD: You Honor, if I could have a moment, I have explained this to him.
>
> THE COURT: Make sure he understands it.
>
> (Pause while Attorney talks with client)
>
> MR. SNEAD: He will admit.
>
> THE COURT: All right. Therefore the State will not be allowed to present any evidence of that. With that does the State rest?
>
> [PROSECUTOR]: Yes, for the issue of that then I won't need to admit for the record those convictions.
>
> THE COURT: He has already admitted them. The procedure as I understand it.

Defendant conferred with his attorney and admitted his prior DWI convictions to prevent the State from presenting this testimony to

the jury. On appeal defendant does not contend the convictions did not belong to him. Trial counsel's discussion with defendant and accompanying statement to the trial court that defendant admits the convictions (an element of the offense) is a sufficient stipulation. Moreover, at the end of the trial and during sentencing, defendant's attorney stipulated to the Level III sentencing for the misdemeanor and the habitual impaired driving. These assignments of error are overruled.

No error.

Judges MCCULLOUGH and LEVINSON concur.

Report per Rule 30(e).